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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. ——

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

v.

CALUMET NATIONAL BANK OF HAMMOND, SUBSTITUTED TRUSTEE UNDER THE TESTAMENTARY TRUST OF HERBERT M. PASZOTTA, DECEASED, KLARA HUHN, AND WANDA PUPPEL

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF INDIANA

The Solicitor General, on behalf of William P. Rogers, Attorney General of the United States, as successor to the Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the Appellate Court of the State of Indiana entered in the above case on April 3, 1958.

OPINIONS BELOW

The Lake Superior Court at Hammond, Indiana, wrote no opinion; that court's findings of fact and conclusions of law appear at R. 70–73. The opinion

and judgment of the Appellate Court (Appendix A, *infra*, pp. 15–22; R. 134) is reported at 149 N. E. 2d 214. The Supreme Court of Indiana, which denied a petition to transfer (R. 140), wrote no opinion.

JURISDICTION

The judgment of the Appellate Court of Indiana (Appendix A, *infra*, pp. 15–22) was entered April 3, 1958 (R. 134). A timely petition for rehearing was denied May 1, 1958 (R. ——). A timely petition to transfer the cause to the Supreme Court of Indiana was denied by that court on June 25, 1958 (R. 140). On September 9, 1958, the time within which to file a petition for a writ of certiorari was extended by Mr. Justice Clark to and including October 23, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTION PRESENTED

Whether the Attorney General's determination that the issuance of a vesting order under the Trading with the Enemy Act is in the national interest may be reviewed and the vesting order be denied enforcement by a state court because, in its view, the amount of enemy property which the order purported to seize represented a considerable sum to the enemy owners and was of negligible importance in relation to the amount involved in American claims growing out of World War II.

STATUTES INVOLVED

Pertinent portions of Sections 5 (b), 7 (c), and 9 (a) of the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. §§ 1–40, as well

as of Executive Order No. 9095, as amended, issued thereunder, are set forth in Appendix B, *infra*, pp. 23–28.

STATEMENT

Acting under the Trading with the Enemy Act and applicable Executive Orders (*infra*, pp. 26–28), petitioner issued the vesting orders here involved and made demand for compliance therewith upon respondent trustee's predecessor who, in turn, petitioned the courts of the State of Indiana for instructions (R. 17–26). The State courts have declined to direct compliance with the vesting orders and have ordered that the property be turned over to the enemy owners (R. 70–73), thereby rejecting the federal right and title claimed by petitioner under the vesting orders throughout these proceedings (see, *e. g.*, 27–34, 38–41, 43–46, 48–50, 70–78, 135–137, 138–140).

The underlying facts may be summarized as follows:

Testator, Herbert M. Paszotta died in 1943, a resident of the State of Indiana (R. 17, 43, 70), leaving the residue of his estate in trust for the benefit of his two sisters (respondents herein), both then of Berlin, Germany, with directions (so far as here relevant) that the trustee hold the property for his sisters for their lives or until the "termination of hostilities" between Germany and the United States, and to pay over the property to his sisters "upon the cessation of the aforesaid state of hostilities" (R. 21).

Both sisters survived and are still alive. Both were residents and citizens of Germany during the war.

On October 5, 1950, petitioner, as successor to the Alien Property Custodian,[1] executed Vesting Order No. 15163 (R. 25–26, 15 Fed. Reg. 6945, October 17, 1950). By that Order, upon finding that the sisters were nationals of a designated enemy country and determining that it was necessary so to do in the national interest, the petitioner vested in himself for the benefit of the United States the interest of the sisters in the trust.[2]

The trial court concluded that the "enemy" sisters, and not the Attorney General, were entitled to the proceeds of the trust. It reasoned (1) that the interest of the sisters was subject to the condition that they survive the formal termination of the state of war and that this did not occur until the adoption of the Joint Resolution of October 19, 1951 (65 Stat.

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[1] The authority and functions of the Alien Property Custodian were transferred to the Attorney General by Executive Order No. 9788, October 14, 1946, 11 Fed. Reg. 11981; 3 CFR 1946 Supp. 169, 50 U. S. C. App. § 6 Note.

Petitioner was substituted as a party in the place of Herbert Brownell, Jr., by order of the Appellate Court of Indiana entered January 27, 1958 (R. 133).

[2] In July 1945, the Alien Property Custodian had issued Vesting Order No. 5135 (R. 27–34); 10 Fed. Reg. 9345, July 27, 1945) by which he vested the interest of the sisters in the estate of the decedent and in the trust provided for in the decedent's will. That order described the property which comprised the interest of the sisters as property "in the process of administration by the Calumet National Bank * * * as Administrator * * *" (R. 32–34). Because the estate had been fully administered and the Administrator discharged earlier in 1945, prior to the issuance of the July 1945 vesting order, the 1950 order was issued to remove any doubts as to the property intended to be reached. (R. 30–32).

451; 50 U. S. C. A. App., p. XX): (2) that until the adoption of the 1951 Joint Resolution the sisters had no right, title or interest in the trust; and (3) that therefore the Attorney General's vesting order in 1950 availed him nothing since the sisters had no interest then which could be taken. It further held "[t]hat the war having been terminated the purpose of the Trading with the Enemy Act no longer existed and hence the Alien Property Custodian had no legal right to the proceeds of the trust or to the interests" of the sisters (R. 70–73).

The Appellate Court disagreed with the grounds of the trial court's decision. It held (1) that the sisters did have an interest which could be seized when the 1950 vesting order was issued and (2) that the seizure powers were not terminated by the cessation of hostilities. Nevertheless, it affirmed.

The Appellate Court took the position that the petitioner's discretionary power to seize enemy property was akin to the power of a trial court over matters resting within its discretion, and that the exercise of this power, like that of the trial court, was therefore subject to review. It then concluded that the issuance of the 1950 vesting order was not necessary in the "national interest" and therefore constituted an abuse of discretion because, in its view, the amount of enemy property which the vesting order purported to seize ($6,178.68) was (a) of negligible importance in relation to the total claims growing out of World War II, and (b) represented a considerable sum to the enemy owners. Accordingly, the court refused

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to enforce the vesting order and affirmed the judgment which directed that the property be turned over to the enemy owners (R. 134).

Petitioner's request for rehearing was denied by the Appellate Court (R. 137) and his petition to transfer the cause was denied by the Supreme Court of Indiana (R. 140).

REASONS FOR GRANTING THE WRIT

The action of the Indiana court in refusing to give effect to the Attorney General's vesting order because, in its view, the issuance of the order was not in the national interest is irreconcilable with the provisions of the Trading with the Enemy Act which give to the executive branch of the government the authority to determine when alien property shall be vested. The decision below is also in direct conflict with decisions of other state and federal courts. These courts have held that Congress has not empowered the judiciary to reexamine the wisdom or propriety of the exercise of executive judgment involved in issuing a vesting order.

In view of this conflict, and in view of the substantial and continuing importance of the question presented (see, *infra*, pp. 11–14), the Government submits that review and reversal of the decision below are warranted.

1. Section 5 (b) of the Trading With the Enemy Act, as amended by Title III of the First War Powers Act, 1941, 55 Stat. 839, provides that the

property of any foreign national "shall vest" in a designated person "when, as, and upon the terms, directed by the President * * *" (Appendix B, *infra*, p. 23). The President, in turn, delegated his powers to the Alien Property Custodian to "vest" when the Custodian determined that this was "necessary in the national interest" (Appendix B, *infra*, p. 27).[3] Thus, "the section gives the President an unrestricted power to be exercised at his discretion * * *" and the Executive Orders delegate this power on the same terms in effect as those "on which the President's own power was conferred." L. Hand, J., in *Silesian-American Corporation* v. *Markham*, 156 F. 2d 793, 796 (C. A. 2), aff'd, *sub nom. Silesian-Ameri-*

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[3] Executive Order No. 9095, March 11, 1942, 3 CFR 1943 Cum. Supp. 1121, as amended by Executive Orders No. 9193, July 6, 1942, 3 CFR 1943 Cum. Supp. 1174, and No. 9567, June 8, 1945, 33 CFR, 1945 Supp., p. 77; 50 U. S. C. App. § 6 Note.

The authority of the Alien Property Custodian also derives from Section 7 (c) of the Act (*infra*, p. 24) which originated during World War I and which provides that "If the President shall so require," enemy property shall be turned over to the Alien Property Custodian, or the same may be seized by the Custodian. By a series of Executive Orders, the powers granted by Section 7 (c) were delegated to the present Custodian, Executive Orders No. 2729–A, October 12, 1917, set out in Meares, *The Trading with the Enemy Act*, pp. 559, 566; No. 2813, February 26, 1918, *id.*, p. 584; No. 3016, December 3, 1918, *id.*, p. 617; No. 6694, May 1, 1934, 28 CFR (1st ed. 1939) § 4.1; No. 8136, May 15, 1939, 4 Fed. Reg. 2044; No. 9142, April 21, 1942, 7 Fed. Reg. 2985; No. 9788, October 14, 1946, 11 F. R. 11981.

can Corp. v. *Clark*, 332 U. S. 469.[4] See also, *Clark* v. *Allen*, 331 U. S. 503, 511. This grant of executive discretion to seize enemy property plainly implies an exclusion of judicial review of the wisdom of its exercise in particular cases.

Other aspects of the statutory scheme likewise show an intention to preclude judicial reexamination of the propriety of an exercise of the seizure power. Thus, Section 7 (c) of the Act directs that "The sole relief and remedy of any person having any claim to any * * * property * * * paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act * * *" (Appendix B, *infra*, p. 24). The sole and exclusive judicial remedy provided by the Act is found in Section 9 (a) (Appendix, *infra*, p. 25). *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 487; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79. The only question open for review in that section, how-

[4] This authority is not terminated by the cessation of hostilities but continues until the "end of the war" is proclaimed. Section 2, Trading with the Enemy Act; *Commercial Trust Co.* v. *Miller*, 262 U. S. 51, 57; *In re Miller*, 281 Fed. 764 (C. A. 2), appeal dismissed, *sub nom. Schaefer* v. *Miller*, 262 U. S. 760; for World War II cases, see *Feyerabend* v. *McGrath*, 189 F. 2d 694 (C. A. D. C.); *National Savings & Trust Co.* v. *Brownell*, 222 F. 2d 395, 397 (C. A. D. C.), certiorari denied, 349 U. S. 955; *Orme* v. *Northern Trust Co.*, 410 Ill. 354, 102 N. E. 2d 335, certiorari denied, *sub nom. Von Hardenberg* v. *McGrath*, 343 U. S. 921.

ever, is, as these cases hold, whether the property is enemy owned.[5]

Consistent with the language and scheme of the statute, the state and federal courts have held, directly contrary to the decision of the Indiana court, that the exercise of the discretion committed to the executive is not subject to judicial review.[6] The Government's vesting program is largely a function of this country's foreign policy and its scope has varied "as rapidly changing world events have altered the requirements of the national interest."[7] Recognizing that the decisions in this area are therefore "political" in nature, the courts have refused to review the

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[5] The remedy set forth in Section 9 (a) meets all constitutional requirements. *Stoehr* v. *Wallace*, 255 U. S. 239; *Becker Steel Co.* v. *Cummings*, *supra*; *Clark* v. *Uebersee Finanz-Korp.*, *supra*.

Section 32 of the Act authorizes discretionary *administrative* relief to certain classes of claimants who might otherwise be ineligible. 60 Stat. 50, as amended, 50 U. S. C. App., § 32. See *Guessefeldt* v. *McGrath*, 342 U. S. 308, 314–315. Action taken under Section 32 is not subject to court review. *McGrath* v. *Zander*, 177 F. 2d 649 (C. A. D. C.); *Hawley* v. *Brownell*, 215 F. 2d 36 (C. A. D. C.).

[6] There has been no assertion of capricious discrimination by petitioner in the exercise of his discretionary power. The Indiana court's emphasis on the value of the property here involved shows merely that it disagreed with the wisdom of the executive judgment in not considering the sum here involved as being of "negligible importance" (R. 134 (6)).

[7] Annual Report, Office of Alien Property Custodian, for the fiscal year ending June 30, 1945, p. 5. For changes in the vesting policy as world conditions changed, see generally Chapter I of each of the Annual Reports of the Office of Alien Property Custodian for the years from 1943 to 1953. Specific

wisdom or propriety of the executive's exercise of discretion. *Orme* v. *Northern Trust Co.*, 410 Ill. 354, 102 N. E. 2d 335, certiorari denied, *sub nom. Von Hardenburg* v. *McGrath*, 343 U. S. 921; *Herrmann* v. *Rogers*, 256 F. 2d 871, 874 (C. A. 9); *United States* v. *Antoinetta*, 153 F. 2d 138, 143 (C. A. 3), certiorari denied, 328 U. S. 863; *Blank* v. *Clark*, 79 F. Supp. 373, 377 (E. D. Pa.); *United States* v. *Chemical Foundation*, 294 Fed. 300, 315–316, 329–330 (D. Del.), aff'd., 5 F. 2d 191 (C. A. 3), aff'd. 272 U. S. 1; *Estate of Schneider*, 140 Cal. App. 2d 710, 720, 296 P. 2d 45, 52, appeal dismissed, *sub nom. Seibert* v. *Brownell*, 352 U. S. 938. Cf. *McGrath* v. *Zander*, 177 F. 2d 649, 651 (C. A. D. C.); *Codray* v. *Brownell*, 207 F. 2d 610, 615 (C. A. D. C.), certiorari denied, 347 U. S. 903.[8]

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examples of changes in world conditions which brought about changes in vesting policy are as follows:

(1) Fall of Italy and assumption of co-belligerent status by Italy in 1943 (*Id.* 1945, pp. 5, 7; *Id.* 1946, p. 3).

(2) Resumption of trade with Hungary, Romania and Bulgaria (*Id.* 1945, p. 5, fn. 8; 1946, p. 2).

(3) Liberation of the Philippines (*Id.* 1946, p. 2).

(4) Resumption of trade with Germany and Japan in 1947 and policy of extending economic aid to rehabilitate these countries (*Id.* 1947, p. 2).

(5) Strengthening of the "looted" securities program which was initiated following the end of hostilities in Europe (*Id.*, 1952, p. 10).

[8] Typical of the decisions with which the holding of the Indiana court is in direct conflict is *Orme* v. *Northern Trust Co.*, *supra*. In that case, the vesting orders, which were issued in 1949, seized interests in a testamentary trust. In reply to the argument that the seizure was not in the national interest because it was "the policy of our government to promote the rehabilitation of the enemy rather than to impose reparations

2. The question is important. A vital function of the Trading with the Enemy Act was to serve as an instrument for the adjustment of problems arising out of the war.[9] See, *Zittman* v. *McGrath*, 341 U. S. 446, 454. One such problem was reparations. This problem was sought to be resolved, so far as concerned the Western powers, in the Paris Agreement which became effective January 24, 1946, and was signed by the United States and 17 Allies, 61 Stat. 3157; T. I. A. S. No. 1655 (Dept. State 1946). The program adopted was designed to avoid the imposition of impossible demands on the vanquished countries in favor of a fair allocation of readily available property. DeVries, "The International Responsibility of the

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through the seizure of the property of enemy nationals" (102 N. E. 2d at 337), the court wrote:

"* * * The power being present, it is a political question and the wisdom or advisability of the action is not open to review by the courts [102 N. E. 2d at p. 338].

* * * * *

"* * * It is not for us to inquire into the purposes of the government in making this seemingly unwarranted and unnecessary seizure. We may or we may not agree with the course followed in vesting these interests. But we are not permitted to speculate as t the reasons for the action taken. It is not for the courts to examine economic or political aspects of the policy established by the departments of government in the fields of their authorized discretion. Even presuming we were equipped to do so, (a presumption we do not indulge in,) we would still be outside the scope and realm of proper judicial functions [102 N. E. 2d at p. 339].

[9] The opinion below suggests that a relevant factor in reviewing the Executive's decision to issue a vesting order is whether or not the order was issued before or after the cessation of hostilities (R. 134 (7)). There is nothing in the statute, nor the cases, which justifies this position. See cases cited in fn. 4, *supra*, p. 8. See also fn. 8, *supra*, p. 10.

United States for Vested German Assets," 51 A. J. I. L. 18, 20 (1957). Enemy assets, located in Allied and neutral countries, were earmarked for the reparations pool and were an indispensable contribution to the pool, particularly since the Allies undertook to make no claim upon the current production of the defeated countries. See Art. 2, 61 Stat. 3163–4. Under the Agreement, the United States agreed to take into its possession enemy assets within its jurisdiction. Art. 6, 61 Stat. 3168–70.

By the War Claims Act of 1948 (62 Stat. 1240, 1247, as amended, 50 U. S. C. A. App., §§ 2001, *et seq.*), the United States committed itself to apply its share of reparations, in the form of vested enemy property, to the payment of claims occasioned by the war, including those of Americans who suffered at the hands of the enemy.[10]

To carry out these commitments and to wind up the vesting program in an orderly way, Congress at the request of the President[11] continued in effect his power to vest German enemy property which was in this country during the war, even though it had other-

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[10] The Federal Republic of Germany has acquiesced in this policy and has undertaken to compensate its citizens whose property was among the vested German assets. See Ch. Six (Reparation), Art. 5, *Convention on the Settlement of Matters Arising out of the War and the Occupation*, Senate Doc. No. 11, 84th Cong., 1st Sess., pp. 77, 103, 6 U. S. T. 4117, 4411, 4492.

[11] See the letter of the President to the Vice-President (97 Cong. Rec. 7762) and Senate Report No. 892, Committee on Foreign Relations, 82d Cong., 1st Sess. (reprinted in U. S. Code Congressional & Administrative Service, 1951, Vol. 2, pp. 2354, *et seq.*).

wise terminated the state of war (Joint Resolution of October 19, 1951, 65 Stat. 451).[12]

The 1950 vesting order here involved is identical in all material respects to the approximately 20,000 issued during World War II. Of these, about 15,000 were issued after the actual fighting had stopped in 1945, of which more than 11,000 were issued after the cessation of hostilities was officially proclaimed on December 31, 1946. Proclamation No. 2714, 12 F. R. 1, 61 Stat. 1048. The decision below means that the wisdom of issuing vesting orders must be established on an *ad hoc* basis to the satisfaction of different judges sitting in different states and districts. There are now in excess of 200 outstanding orders which the Government is seeking to enforce and which are therefore within the purview of the Indiana Court's opinion. The opinion is in fact already being used as a basis for resisting compliance.[13] It will probably

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[12] The validity of this reservation of the seizure power has been upheld on many occasions. *Farbenfabriken Bayer* v. *Sterling Drug, Inc.*, 251 F. 2d 300 (C. A. 3), cert. denied 356 U. S. 957; *Ladue & Co.* v. *Brownell*, 220 F. 2d 468 (C. A. 7), cert. denied, 350 U. S. 823; *Brownell* v. *Schering*, 129 F. Supp. 879, 894 (D. N. J.), affirmed, 228 F. 2d 624 (C. A. 3), cert. denied, 351 U. S. 954; *Brownell* v. *Union & New Haven Trust Co.*, 143 Conn. 662, 669, 124 A. 2d 901, 906; *Estate of Schneider*, 140 Cal. App. 2d 710, 719–720, 296 P. 2d 45, 51–52, appeal dismissed *sub nom. Seibert* v. *Brownell*, 352 U. S. 938; *Estate of Renjes*, 42 Hawaii Rep. 151.

[13] See, e. g., *In re Trusteeship Under Last Will and Testament of Albert Schmidt*, Supreme Court of Minn., No. 37515, Respondent's Brief, p. 23; *Schieb* v. *United States*, C. Cls., No. 22–58, Plaintiff's Memo. in Opp. to Summary Jgt., pp. 26–27; *von Bredow* v. *United States*, C. Cls., No. 470–57; Plaintiff's Brief in Opp. to Summary Jgt., pp. 19, 34–35. These cases are pending argument.

also be relied on in suits under Section 9 (a) (*infra*, p. 25) for the return of vested property already in the possession of the Attorney General. It will, in short, stimulate extended litigation on a matter which was heretofore generally assumed to be settled.

CONCLUSION

The state court has refused to give effect to a seizure order because, in that court's view, the seizure was not in the national interest. There is no suggestion that the Attorney General's action was in violation of any express or implied legal limitations on the exercise of his authority. In substituting its judgment for that of the Attorney General in a matter which Congress has left for executive determination, the court has rendered a decision which is not reconcilable with the terms or the scheme of the Trading with the Enemy Act and which is in direct conflict with the decisions of both state and federal courts. In view of the patent error, it is respectfully submitted that this petition for a writ of certiorari should be granted and the judgment below reversed without further briefs or argument.

J. LEE RANKIN,
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DALLAS S. TOWNSEND,
Assistant Attorney General.

GEORGE B. SEARLS,
IRWIN A. SEIBEL,
Attorneys.

OCTOBER 1958.

APPENDIX A

Opinion and Judgment

In the Appellate Court of Indiana in Banc
No. 18,897

In the Matter of the Testamentary Trust of Herbert M. Paszotta, Deceased; Herbert Brownell, Jr., Attorney General of the United States of America, appellant-respondent

v.

Calumet National Bank of Hammond, Substituted Trustee Under the Testamentary Trust of Herbert M. Paszotta, Deceased, appellee-petitioner; Klara Huhn, appellee-intervenor; and Wanda Puppel, appellee-intervenor

Appeal From the Lake Superior Court, Room No. 1

Hon. Joseph V. Stodola, Jr., Judge

Crumpacker, *J.*

This is an appeal by the Attorney General of the United States, acting in his capacity as successor to the Alien Property Custodian, from a decree of the Lake Superior Court wherein the assets in the hands of the Calumet National Bank, as the trustee of a testamentary trust created by the will of Herbert M. Paszotta, deceased, were ordered distributed to the appellees Klara Huhn and Wanda Puppel in disregard of a vesting order issued by said Attorney General on October 5, 1950, pursuant to the Trading with

the Enemy Act, as amended, 40 Stat. 411, as amended, 50 U. S. C. App., §§ 5 (b) and 7 (c). Said vesting order reads as follows:

DEPARTMENT OF JUSTICE

OFFICE OF ALIEN PROPERTY

VESTING ORDER 15163

Re: Trust under Will of Herbert M. Paszotta, deceased, also known as Herbert Paszotta, deceased. File D 28-9181 E. T. Sec. 11891

Under the authority of the Trading with the Enemy Act as amended and Executive Order 9788, and pursuant to law, after investigation, it is hereby found:

1. That Klara Huhn and Wanda Puppel, nee Paszotta, whose last known address is Germany, are residents of Germany and nationals of a designated enemy country (Germany);

2. That all right, title, interest and claim of any kind or character whatsoever of the persons named in subparagraph 1 hereof, and each of them, in and to the trust under the will of Herbert M. Paszotta, deceased, also known as Herbert Paszotta, deceased, is the property payable or deliverable to, or claimed by the aforesaid nationals of a designated enemy country (Germany);

3. That such property is in the process of administration by Mrs. Helen B. Fisher, Trustee, acting under the judicial supervision of Lake Superior Court, Hammond, Indiana; and it is hereby determined:

4. That to the extent that the persons named in sub-paragraph 1 hereof are not within a designated enemy country, the national interest of the United States requires that such persons be treated as nationals of a designated enemy country (Germany).

All determinations and all actions required by law, including appropriate consultation and certification, having been made and taken, and it being deemed necessary in the national interest,

There is hereby vested in the Attorney General of the United States the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in section 10 of Executive Order 9193, as amended.

Executed at Washington, D. C., on October 5, 1950.

(OFFICIAL SEAL)

For the Attorney General:

(s) HAROLD I. BAYNTON,
Assistant Attorney General,
Director, Office of Alien Property.

The challenged decree was apparently entered by the Lake Superior Court upon the legal conclusions (1) that the appellees Huhn and Puppel, when the above vesting order was issued, had a mere expectancy of title to the property involved and had not yet taken anything under the Paszotta will and therefore there was nothing upon which said vesting order could operate; and (2) that the war with Germany, having in fact been terminated when the vesting order was issued, the purposes of the Trading with the Enemy Act no longer existed and hence the Attorney General had no legal right to the proceeds of the Paszotta trust.

Herbert M. Paszotta died testate on November 11,

1943. That part of his will pertinent to this inquiry is as follows:

> Third: I hereby give, bequeath, and devise, absolutely and forever, all the rest, residue and remainder of my property real, personal or of whatever nature and wherever situated of which I may die possessed or of which I may have the power of disposition, to the aforesaid Mrs. Helen Fisher, but IN TRUST nevertheless for the following trust purposes:
>
> a. To receive, hold and administer all of my said estate and property for the sole benefit of KLARA HUHN and WANDA PUPPEL both of Berlin, Germany, during the natural lives of said Klara Huhn and Wanda Puppel or until the termination of hostilities now in existence between the United States of America and the Nation of Germany, if said termination of hostilities occur before the deaths of Klara Huhn and Wanda Puppel.
>
> b. To manage and conduct the affairs relating to said property so that during the continuation of the aforesaid state of hostilities any and all proceeds resulting from the conduct of the property are held in safekeeping for the benefit of the aforesaid Klara Huhn and Wanda Puppel.
>
> c. To pay over, convey, and transfer absolutely in fee simple to Klara Huhn and Wanda Puppel, the entire principal of this trust upon the cessation of the aforesaid state of hostilities and then there to terminate the trust herein imposed, and should the deaths of Klara Huhn and Wanda Puppel occur before the aforesaid cessation of hostilities and before the resumption of normal commercial and political relations between the United States of America and the Nation of Germany, then I direct that this trust is to cease and terminate, and the principal and all accumulated proceeds conveyed, transferred or paid over to said Helen Fisher, absolutely and in fee simple.

Klara Huhn still lives in Germany and Wanda Puppel while still a German citizen came to the United States as a quota immigrant in September 1954, and now lives in Baltimore, Maryland.

It will be noted that the trust created by the Paszotta will was to terminate upon the cessation of hostilities and the resumption of normal commercial and political relations between the United States and Germany and if Klara Huhn and Wanda Puppel were then alive the principal of said trust and all accumulations thereon should be paid over, conveyed and transferred to them absolutely and in fee simple. Upon the trial of this cause the parties stipulated, *inter alia,* as follows:

> (7) That the President of the United States of America by proclamation, No. 2714, dated December 31, 1946, (12 Federal Register 1) proclaimed the formal cessation of hostilities of World War II to be effected as of 12 o'clock noon, December 31, 1946.
>
> (8) That normal commercial and political relations between the United States of America and Germany and the citizens of both countries were resumed on December 31, 1946, by virtue of the United States Treasury General License No. 94, Code of Federal Regulations, Section 512.194.

Pursuant to such stipulation, no doubt, the court, in its special finding of facts, found the following:

> 5. That on December 31st, 1946, the President of the United States by Proclamation No. 2714 proclaimed the formal cessation of hostilities of World War II as between the United States of America and Germany.

Thus we are forced to the conclusion that the absolute ownership of the property held in trust for the appellees Huhn and Puppel under the terms of the

Paszotta will vested in them on December 31, 1946, and the court was in error in holding that when the Attorney General issued his vesting order of October 5, 1950, said appellees had nothing that could be seized.

This brings us to a consideration of the court's conclusion that the seizure order of 1950 was illegal because it came after the shooting war had ended and after the cessation of hostilities had been proclaimed by the President and was therefore wholly outside the intent and purpose of the Trading with the Enemy Act. The Supreme Court of the United States seems firmly committed to the proposition that the seizure powers of the Federal Government under the Trading with the Enemy Act are not terminated by the cessation of hostilities. *Commercial Trust Co.* v. *Miller* (1923), 262 U. S. 51; *Schaefer* v. *Miller* (1923), 262 U. S. 760; *Orme* v. *Northern Trust Co.* (1952), 410 Ill. 354, 102 N. E. 2d 335, Certiorari denied, sub. nom *von Hardenburg* v. *McGrath* (1952), 343 U. S. 921; *National Savings & Trust Co.* v. *Brownell* (1955), 222 F. 2d 395, (C. A. D. C.), Certiorari Denied, 349 U. S. 955.

Nevertheless the powers of the Attorney General to seize property by virtue of the Trading with the Enemy Act should be exercised only if a failure to seize it will result in detriment to the United States and never if seizing it will result only in injury to an individual owner and be without benefit to the United States. *Keppleman* v. *Keppleman* (1918), (N. J. Ch.), 103 A. 27. See also *Guessefeldt* v. *McGrath* (1952), 342 U. S. 308, 96 L. Ed. 342.

It has been held that the determination of whether or not an alien enemy's property in this country shall be seized by virtue of the Trading with the Enemy

Act lies within the sound discretion of the Attorney General, *Clark* v. *Allen* (1947), 331 U. S. 503, and ordinarily the wisdom of its exercise will not be reviewed by the courts. *Hirabayashi* v. *United States* (1943), 320 U. S. 81. However, we have found no decision specifically holding that the Attorney General can do no wrong in determining such matters and therefore his findings and decisions cannot be reviewed by the courts. The decisions are legion that matters resting in the discretion of the trial court can be reviewed from an abuse in the exercise thereof. We can think of no valid reason why the Attorney General of the United States should be beyond the reach of that universally recognized principle of the law.

Approaching the present question with the conviction that the discretion exercised by the Attorney General can be reviewed, it seems to us that the seizure of an alien enemy's property under circumstances that can be of no substantial benefit to the United States but of great injury to the owners thereof, amounts to confiscation and therefore an abuse of discretion on the part of the officer authorizing the seizure. *Gregg's Estate* (1920), 266 Pa. 189, 109 A. 777.

As far as the present record discloses the value of the property seized was $6,178.68 and as revenue for the payment of claims growing out of World War II such a sum of money is of negligible importance. That it was not urgently needed nor of any estimable benefit to the United States is indicated by the fact that the war with Germany had been over four years before the Attorney General issued the vesting order in question. It is true that such order recites that seizure is "deemed necessary in the national interests" but surely that bald statement does not make it so nor does it foreclose a court from reviewing the

order for abuse of discretion in its issuance. We find absolutely nothing in this record justifying the Attorney General's assertion that the seizure of $6,178.68 belonging to the appellees Huhn and Puppel, and to them a considerable amount, no doubt, is "necessary in the national interests." Such finding was apparently made in *ex parte* proceedings and it seems to us that when private property is seized without compensation to the owner, between the time of the actual cessation of hostilities and when Congress, by joint resolution, formally proclaims the end of the war the record should show some justification for the action aside from the self-serving declaration of the seizing officer.

We recognize and affirm the general discretionary power of the Attorney General to seize the property of alien enemies after the termination of hostilities but we can find no necessity for such action in the present case and the exercise of the power, under the circumstances disclosed by the record before us, was an abuse of the discretion vested in the Attorney General.

Judgment affirmed.

APPENDIX B

1. Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. 1, *et seq.*:

* * * * *

Sec. 5, as amended by the First War Powers Act of 1941, § 301, 55 Stat. 839, 50 U. S. C. App. 5:

* * * * *

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as

may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

Sec. 7, as amended by the Deficiency Appropriation Act of Nov. 4, 1918, c. 201, Sec. 1, 40 Stat. 1020:

* * * * *

(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, trans-

ferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * *

Sec. 9 (a), as amended by the Act of March 4, 1923, c. 285, Sec. 1, 42 Stat. 1511:

Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property.

If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

2. Executive Order No. 9095, March 11, 1942, 3 CFR, 1943 Cum. Supp. 1121, as amended by Executive Orders No. 9193, July 6, 1942, 3 CFR, 1943 Cum.

Supp. 1174, and No. 9567, June 8, 1945, 3 CFR, 1945 Supp. 77; 50 U. S. C. App. Note to § 6.

* * * * *

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

* * * * *

(f) any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision or which is in partition, libel, condemnation or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof.

* * * * *

6. To enable the Alien Property Custodian to carry out his functions under this Executive Order, there are hereby delegated to the Alien Property Custodian or any person, agency, or instrumentality designated by him all powers and authority conferred upon me by section 5 (b) of the Trading with the Enemy Act, as amended, including, but not limited to, the power to make such investigations and require such reports as he deems necessary or appropriate to determine whether any enterprise or property should be subject to his jurisdiction and control under this Executive Order. The powers and authority conferred upon the Alien Property Custodian by Executive Order No. 9142 shall be administered by him in conformity with the provisions of this Executive Order.

* * * * *

12. Any orders, regulations, rulings, instructions, licenses or other actions issued or taken by any person, agency or instrumentality referred to in this Executive Order, shall be final and conclusive as to the power of such person, agency or instrumentality to exercise any of the power or authority conferred upon me by sections 3 (a) and 5 (b) of the Trading with the Enemy Act, as amended; and to the extent necessary and appropriate to enable them to perform their duties and functions hereunder, the Secretary of the Treasury and the Alien Property Custodian shall be deemed to be authorized to exercise severally any and all authority, rights, privileges and powers conferred on the President by sections 3 (a) and 5 (b) of the Trading with the Enemy Act of October 6, 1917, as amended, and by sections 301 and 302 of Title III of the First War Powers Act, 1941, approved December 18, 1941. No person affected by any order, regulation, ruling, instruction, license or other action issued or taken by either the Secretary of the Treasury or the Alien Property Custodian shall be entitled to challenge the validity thereof or otherwise excuse his actions, or failure to act, on the ground that pursuant to the provisions of this Executive Order, such order, regulation, ruling, instruction, license or other action was within the jurisdiction of the Alien Property Custodian rather than the Secretary of the Treasury or vice versa.

U. S. GOVERNMENT PRINTING OFFICE: 1988

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JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 468

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN,

Petitioner,

vs.

CALUMET NATIONAL BANK OF HAMMOND, SUBSTITUTED TRUSTEE UNDER THE TESTAMENTARY TRUST OF HERBERT M. PASZOTTA, DECEASED, KLARA HUHN, AND WANDA PUPPEL,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION.

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IN THE

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CALUMET NATIONAL BANK OF HAMMOND, SUBSTITUTED TRUSTEE UNDER THE TESTAMENTARY TRUST OF HERBERT M. PASZOTTA, DECEASED, KLARA HUHN, AND WANDA PUPPEL,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Appellate Court of Indiana (Appendix A of Petition) is reported at 149 N. E. 2nd 214.

JURISDICTION.

The jurisdiction requisites are adequately set forth in the petition.

QUESTION PRESENTED.

The question that is presented herein is incorrectly stated in petitioners' brief. Petitioners seem to feel that the reason the trial court below refused to enforce the vesting order was because it was of negligible importance

to the United States (Attorney General) while of great importance to the heirs. The amount in controversy is $6,178.68. (See Opinion of Appellate Court of Indiana—Appendix A, Petitioners' Brief.)

The real question is "whether or not the vesting order of the Alien Property Custodian is subject to review by the courts."

STATEMENT.

Herbert M. Paszotta was killed on November 11th, 1943 in Italy while he was in the service of the United States Army. He left a Will leaving his entire estate to Helen Fisher, a citizen and resident of the United States, IN TRUST, for the use and benefit of two sisters, who at that time were presumed to have resided in Berlin, Germany. (One of the sisters now resides in the United States.)

Payment was contingent upon two conditions, namely:

(a) the cessation of hostilities between the United States and Germany, and

(b) that the sisters survive the war.

The will further provided that in the event the sisters failed to survive, Helen Fisher was to receive the entire estate. The pertinent portion of the will (as is set forth in the Opinion of the Appellate Court of Indiana), is as follows:

> "Third: I hereby give, bequeath, and devise, absolutely and forever, all the rest, residue and remainder of my property real, personal, or of whatever nature and wherever situated of which I may die possessed or of which I may have the power of disposition, to the aforesaid Mrs. Helen Fisher, but IN TRUST nevertheless for the following trust purposes:
>
> a. To receive, hold and administer all of my said estate and property for the sole benefit of KLARA HUHN and WANDA PUPPEL both of Berlin, Germany, during

the natural lives of said Klara Huhn and Wanda Puppel or until the termination of hostilities now in existence between the United States of America and the Nation of Germany, if said termination of hostilities occur before the deaths of Klara Huhn and Wanda Puppel.

b. To manage and conduct the affairs relating to said property so that during the continuation of the aforesaid state of hostilities any and all proceeds resulting from the conduct of the property are held in safekeeping for the benefit of the aforesaid Klara Huhn and Wanda Puppel.

c. To pay over, convey, and transfer absolutely in fee simple to Klara Huhn and Wanda Puppel, the entire principal of this trust upon the cessation of the aforesaid state of hostilities and then there to terminate the trust herein imposed, and should the deaths of Klara Huhn and Wanda Puppel occur before the aforesaid cessation of hostilities and before the resumption of normal commercial and political relations between the United States of America and the Nation of Germany, then I direct that this trust is to cease and terminate, and the principal and all accumulated proceeds conveyed, transfered or paid over to said Helen Fisher, absolutely and in fee simple."

Following his death, an estate was opened in the Lake Superior Court at Hammond, Indiana, (which was his residence prior to his induction into the armed forces) on March 15th, 1944. The estate was fully administered and closed on March 13th, 1945, and the net proceeds of the estate ($6,178.68) turned over to Helen Fisher, Trustee. (Helen Fisher died during these proceedings, and the Calumet National Bank of Hammond was named Successor Trustee.)

The vesting order which petitioners complained was denied enforcement, was filed on November 8th, 1950 (Vesting Order No. 15163), more than 5½ years after the

estate was closed; more than five years after the war between the United States and Germany ended, and almost 4 years after the President of the United States officially proclaimed the cessation of hostilities to be effective. (President's Proclamation No. 2714, December 31st, 1946, 12 Fed. Reg. 1, 50 U. S. C. A. App. Sec. 601 note.)

When the Alien Property Custodian filed his vesting order, the trustee filed a petition for instructions as to whom the money on hand should be paid, namely, the heirs or the Alien Property Custodian.

The trial court determined that the money should be paid to the heirs, and the Appellate Court of Indiana affirmed this judgment.

The court held that "The powers of the Attorney General to seize property by virtue of the Trading with the Enemy Act should be exercised only if a failure to seize it will result in a detriment to the United States and never if seizing it will result only in injury to an individual owner and be without benefit to the United States. (*Keppleman* v. *Keppleman* (1918) N. J. Ch. 103 A. 27. See also *Guessefeldt* v. *McGrath* (1952) 342 U. S. 308, 96 L. Ed. 342) * * *"

The question presented, therefore, is not the simple refusal of the Indiana Courts to enforce a vesting order because of its "negligible importance," but rather taking all of the facts and occurrences into consideration, should the courts recognize and enforce a vesting order that results in no benefit to the United States, but in effect simply amounts to a confiscation of an owner's property.

Another view of the question presented is, "How long after the war may the Alien Property Custodian seize property alleged belonging to an enemy alien." Is it 5, 10 or 20 years?

ARGUMENT.

The opinion of the Appellate Court of Indiana was in some respects a response to two of the propositions urged by the Alien Property Custodian. Those arguments were:

> (a) an important purpose of the Trading with the Enemy Act was to make assets available in defraying the costs of war. (Vesting was a phase of a plan to solve the reparation problem left by World War II.)
>
> (b) whether or not the discretion regarding the seizure of enemy property has been soundly exercised is not subject to court review.

The argument that the petitioners urged in the Appellate Court of Indiana to the effect that it was a primary purpose of the Trading with the Enemy Act to seize property for the purpose of making assets to pay reparations was rejected by the Appellate Court, so far as it applied to this case. The court held as follows:

> "As far as the present record discloses the value of the property seized was $6,178.68 and as revenue for the payment of claims growing out of World War II, such a sum of money is of negligible importance.
>
> That it was not urgently needed nor of any estimable benefit to the United States is indicated by the fact that the war with Germany had been over four years before the Attorney General issued the vesting order in question. It is true that the vesting order recites that seizure is 'deemed necessary in the national interests' but surely that bold statement does not make it so nor does it foreclose a court from reviewing the order for abuse of discretion in its issuance * * *." (See opinion of Appellate Court—page 21, Petitioner's Brief.)

It has always been the law in this country that the purpose of the Trading with the Enemy Act was to prevent property belonging to enemy nationals from falling into enemy hands and to prevent the lending of aid and comfort to the enemy. (*In Re Rahns Estate*, 291 S. W. 120, 51 A. L. R. 877; *In Re Kielsmark's Will*, 177 N. W. 690; *Guessefeldt* v. *McGrath*, 342 U. S. 308, 96 L. Ed. 342.)

The purpose of the act was to prevent American money from falling into enemy hands and to prevent the lending of aid and comfort to the enemy by frustrating the enemy's attempt to garner sinews of war. (*Manila Motors* v. *Ivaran*, D. C.-N. Y., 46 Fed. Supp. 394; *Pipe* v. *LaSalle*, D. C.-N. Y., 49 Fed. Supp. 662.)

The act was not for the purpose of the confiscation of property of private individuals. (*In Re Greggs Estate*, 266 Pa. 189, 109 Atl. 777.) Its purpose was to prohibit and prevent the lending of aid to the enemy. Confiscation is not the objective. (*Drewry* v. *Onassis*, 39 N. Y. S. 2nd 688.)

The purpose was to prevent the possession, utilization and disposition of assets and property in this country belonging to enemy nationals by such hostile powers; but it was not its purpose to interrupt the normal administration of justice. (*Brown* v. *J. P. Morgan & Co.*, 31 N. Y. S. 2nd 815.)

The purpose of the Trading with the Enemy Act must be construed in light of the purposes, first, to prevent an act resulting in detriment to the United States in war, and second, not to permit or compel an act resulting in injury to an individual alien without benefit to the United States. (*Keppleman* v. *Keppleman*, N. J. Ch., 103 A. 27.)

The ruling of the Appellate Court of Indiana in this case is in accord with these principles. The court held:

"* * * We find absolutely nothing in this record jus-

tifying the Attorney General's assertion that the seizure of $6,178.68 belonging to the appellees Huhn and Puppel, and to them a considerable amount, no doubt, is 'necessary in the national interests.' Such finding was apparently made in *ex parte* proceedings, and it seems to us that when private property is seized without compensation to the owner between the time of the actual cessation of hostilities and when Congress by joint resolution, formally proclaims the end of the war, the record should show some justification for the action aside from the self-serving declaration of the seizing officer * * *"

So that the purpose assigned by the Attorney General that one of the reasons for the seizure of this property is to pay war claims, or to make assets for war reparations, was rejected by the Appellate Court of Indiana, and will also, we hope, be declined by this court.

The second argument assigned by the Petitioners is that the discretion of the Attorney General in seizing property belonging to an enemy national, is never subject to review by any court.

The Appellate Court of Indiana observed that:

"It has been held that the determination of whether or not an alien enemy's property in this country shall be seized by virtue of the Trading with the Enemy Act lies within the sound discretion of the Attorney General (*Clark* v. *Allen*, 331 U. S. 503), and ordinarily the wisdow of its exercise will not be reviewed by the courts. (*Hirabayashi* v. *United States*, 320 U. S. 81.) However, we have found no decision specifically holding that the Attorney General can do no wrong in determining such matters and therefore his findings and decisions cannot be reviewed by the courts.

The decisions are legion that matters resting in the discretion of the trial court can be reviewed from an abuse in the exercise thereof. We can think of no valid reason why the Attorney General of the United States should be beyond that universally recognized principle of the law * * *"

There have been many other decisions holding that the acts of the Alien Property Custodian are subject to review by the courts.

In *Keppleman* v. *Keppleman*, 103 A. 27, the New Jersey court denied the right of the Alien Property Custodian to take property willed to three German nationals prior to the entry of a final decree in the state court. The effect of this ruling was that the filing of a vesting order by the Alien Property Custodian in and of itself was of no immediate consequence.

In *Re Kielsmark's Will*, 177 N. W. 690, the Iowa court held that a devise to an enemy alien is not void under the Trading with the Eenemy Act, and that notwithstanding the vesting order, the property would be held by the executor until the termination of the war.

In *Klein* v. *Palmer*, 18 Fed. 2nd 932, the court denied relief in equity for a recovery of the property because the vesting order came after the termination of hostilities.

In *Southerland* v. *Guarantee Trust Co.*, 11 Fed. 2nd 696, the court held that the Alien Property Custodian was not entitled to recover a bank deposit held to the credit of a former enemy alien but not reported through an honest error until after the resolution declaring the end of the war.

In *Matheson* v. *Hicks*, 10 Fed. 2nd 872, a demand for property by the Alien Property Custodian served after termination of the war, was held by the court, to be ineffective.

In *Re Sutherland*, 23 Fed. 2nd 595, the court held that the Alien Property Custodian's right to seize enemy acquired property ceased on the declaration of peace.

In *Clark* v. *Edmunds*, 73 Fed. Supp. 390, the court refused to enforce a vesting order for the reason that it was premature.

In *Brownell* v. *Edmunds*, 110 Fed. Supp. 828, the court denied a motion for summary judgment (to enforce a vesting order) for the reason that the war had terminated.

In *Harvard Trust Co.* v. *Attorney General*, 329 Mass. 79, 106 N. E. 2nd 269, the court construed the provisions of a trust to the effect that it would entitle the heirs at law to make a recovery rather than the Alien Property Custodian.

In *Re Thramm's Estate* (Cal.), 183 Pac. 2nd 97, the court held that the bequests should go to American nationals and not to the Alien Property Custodian.

And, finally, in *Guessefeldt* v. *McGrath*, 342 U. S. 308, 96 L. Ed. 342, this Court ordered a return of the property seized by the Alien Property Custodian from a citizen of Germany, who, although a resident of Hawaii for 42 years, was caught in Germany at the outbreak of the war while visiting there with his family. While the court did not hold that it was reviewing the discretion of the Alien Property Custodian, it did say:

> "Certainly, the constitutional problem is not imaginary, and the claim not frivolous which would have to be rejected to decide in the government's favor. Considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited * * *."

It is not the purpose of the Trading with the Enemy Act to seize properties of alleged enemy nationals to create a fund to pay war claims or make assets available to defray the expenses of war. The real purpose of the act is to prevent trading with the enemy and to stop such uses of foreign property rights existing in the United States, at the time of war, as might imperil our national defense. (*In Re Braier's Estate* (N. Y.), 111 N. E. 2nd 424.)

So that when the war comes to an end, and nations are at peace, the purpose of the Trading with the Enemy Act

ceases, and the taking of property years later amounts to confiscation. The attempted vesting by the Alien Property Custodian in this case is therefore too late. It accomplishes no purpose, within the meaning and intent of the Act, and, if given effect, would result in confiscation.

In *Guessefeldt* v. *McGrath*, 342 U. S. 308, 96 L. Ed. 342, the court concluded:

> "The concern of the Trading with the Enemy Act is with problems at once complicated and far reaching in their epercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislations strongly counsels against litera'ness of application. It favors a wise latitude of construction in enforcing its purposes." (Citing several cases.)

The Appellate Court of Indiana has followed that decision and has reached the same result as reached by this Court.

The power of the courts to review the acts of the Alien Property Custodian (or his successor, the Attorney General) should not be taken away and contention which urges this principle should be rejected.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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